1980

# Eldon E. Rasmussen v. United States Steel Company : Brief of Appellant

Utah Supreme Court



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# IN THE SUPREME COURT
# of the
# STATE OF UTAH

ELDON E. RASMUSSEN,

*Plaintiff and Appellee,*

— vs. —

UNITED STATES STEEL COMPANY,
a corporation,

*Defendant and Appellant.*

## BRIEF OF APPELLANT

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## CITATIONS

# IN THE SUPREME COURT
# of the
# STATE OF UTAH

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ELDON E. RASMUSSEN,
*Plaintiff and Appellee,*

— vs. —

UNITED STATES STEEL COMPANY, a corporation,
*Defendant and Appellant.*

Case No. 8081

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## BRIEF OF APPELLANT

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Defendant appeals from judgment entered below on the jury's verdict that defendant was indebted to plaintiff in a stipulated sum under an implied contract for additional compensation for services, over and above the compensation for such services at the rate established by the express contract of employment between the employer and plaintiff.

### STATEMENT OF THE CASE

Plaintiff Eldon E. Rasmussen was hired by defendant's predecessor, Geneva Steel Company, on January 20, 1947. (R. 136) On November 16, 1950 he presented his written resignation (Ex. D-17) effective at the end of that month. (R. 141)

Rasmussen was employed in the Company's general offices, a unit or place of employment separate and apart from the operating plants, mines and quarries of the Company wherein employees are generally represented for collective bargaining purposes by various labor organizations; these agents of course determine the rates of compensation and other working conditions for the employees of their bargaining units by express contracts with the employer. (R. 78) In contrast, the basic express contract of employment in plaintiff's case was strictly a bilateral agreement between employer and this employee; and all compensation under this express contract was long since paid in due course for services performed between January 20, 1947 and November 30, 1950, inclusive. (R. 139) From 275 to 300 employees were so employed in the general offices, in contrast to some four to five thousand in the plants. (R. 156)

Beginning in 1944 by agreement with the C.I.O. the various subsidiaries of United States Steel began an "inequities" job evaluation program. (R. 64) In the case of employees represented by the various unions, the union contracts were specific as to the conduct of the job evaluation program, and set definite cut-off dates by which time an employee must apply in writing for retroactive pay; such pay would then become due under such application if determined to be due under the job evaluation program, whether or not the particular employee happened to be on the payroll at the effective date of the plan. (R. 70) The Company on its own initiative subsequent to the completion of the job evaluation for the union employees, likewise so provided in the case of all salaried

*plant* employees, whether or not covered by union contracts. (R. 71)

Plaintiff was employed in the Engineering Department of the *general office* as a power and fuel engineer. (R. 71) In the fall of 1950 Geneva Steel Company began a job evaluation program for its general office employees. (R. 68) It was under no obligation to do so, undertaking the project on its own initiative. (R. 78, 110) This evaluation was not completed until 1951, when its details were announced and it was made effective June 3rd of that year. (R. 69)

It will be recalled that plaintiff had resigned, effective December 1, 1950. (Ex. D-17, R. 141)

As to general office employees, the Company took the position that they must be on the payroll *at the effective date of the evaluation plan* in order to receive any retroactive pay attributable to a particular job. (R. 72) Accordingly, the increases applicable to the job held by plaintiff were not paid plaintiff, who made demand therefor in May of 1951. (R. 138) Refusal led to this lawsuit, complaint being filed July 28, 1952. (R. 1)

Judgment based upon the jury's verdict for the established amount due, if any, was entered June 2, 1953. (R. 210) This appeal was taken by defendant on July 23, 1953 from the money judgment (R. 220), motion for new trial having been denied June 26, 1953 (R. 221)

## STATEMENT OF POINTS

### I.

**There is no competent evidence that plaintiff and defendant's predecessor entered into an implied contract to**

**pay retroactively to its general office employees including plaintiff, such salary differential as might be determined by the Company's own job evaluation, regardless of whether or not an employee should be on the payroll at the time such retroactive pay, if any, should be determined and ordered paid by the Company.**

**II.**

**The court erred in admitting evidence of acts by the Company subsequent to November, 1950, by which time plaintiff's employment had ceased.**

**III.**

**The court erred by its instruction No. 10 in permitting the jury to consider evidence of acts of the employer subsequent to November, 1950, by which time plaintiff's employment had ceased.**

## ARGUMENT

### I.

**There is no competent evidence that plaintiff and defendant's predecessor entered into an implied contract to pay retroactively to its general office employees including plaintiff, such salary differential as might be determined by the Company's own job evaluation, regardless of whether or not an employee should be on the payroll at the time such retroactive pay, if any, should be determined and ordered paid by the Company.**

Plaintiff sought to establish his implied contract upon which the judgment is based on the following evidence most favorable to plaintiff:

a. Testimony that it had been the "custom" or "policy" of the Company on two occasions to grant to non-union employees general increases, such as cost-of-

living increases, at about the same time and comparable in amount as those granted to its union employees; this not as an obligation, but in order not to leave any group of employees out and to treat all fairly. An example was the testimony of James L. Dillon, former Superintendent of Industrial Relations of the employer. (R. 61, 80, 82)

b. In addition plaintiff was permitted over objection to introduce a series of exhibits constituting various news releases and general announcements discussing in general terms the job evaluation program. (Exhibits P-1 to 8, inclusive.) It is submitted that none of these are specific or refer to the general office employees.

c. Plaintiff then established that before he had resigned he had prepared a job description of his position in October. (Ex. P-9, R. 142) Also the obvious fact that the employees knew an evaluation program was under way for the general offices. (R. 77) But it was perfectly clear that the employees did not know whether or not there would be an effective program at all adopted by the Company until the announcement of December 15, 1950 (Ex. D-15, D-16) And the details of the program and the conditions whereunder it was to be applicable to the particular employee were not established until June 1, 1951, effective June 3rd of that year. (Ex. P-12)

For example, Witness Sumsion for plaintiff testified (R. 133):

> Q. And did you think those in the plant, that they had a reclassification program that permitted, in some instances, men who no longer were on the payroll at the time to get their

retroactive pay, did you think because of that you would be entitled to that in the general office?

A. Let me say, I sincerely hoped so. I could not positively say, but we all felt that way.

Q. Of couse you hoped so, but you didn't know what the company would do, did you?

A. They stated in one bulletin there was a program under way that would include us.

Q. Now we are talking about these retroactive payments, you didn't know what the company would do, in respect to the program for the general offices with relation to retroactive pay, did you?

A. Well one could never be sure until he was actually,—until he had received the pay, I suppose, but we knew the program was under way, and we all felt we would be included.

Q. The program was under way, but you didn't know what turns it would take, did you?

A. I don't follow you exactly.

Q. On what terms the retroactive payments would be made, you didn't know, did you?

A. Well, we knew they would be made, they would be paid on the basis of our job descriptions, the work we were doing.

Q. But whether a man was on the payroll or not, you didn't know whether it would have an effect one way or the other?

A. No sir.

Q. You didn't know anything about that?

A. No.

Q. You say "no"?

A. No.

Q. In the nature of things, you couldn't know anything about it could you?

A. No sir.

Q. You got your retroactive pay?

A. Yes sir.

Q. You were on the payroll when you got it, weren't you?

A. Yes sir.

Q. In other words, you hoped you would get it when the program was in progress, that is all you knew about it, isn't it?

A. Actually it probably boiled down to a hope; coupled with the fact that we all felt we would get in and the fact that we felt we had it coming.

Plaintiff himself testified on direct examination (R. 137):

Q. Did you know about the job classification program that took effect in connection with salaried employees in the plant?

A. Yes sir, I did.

Q. Were you ever advised by the company prior to the time you left the company, if you expected to get your retroactive pay you would have to be on the payroll on the effective date?

A. No sir.

Q. When you anticipated leaving the company, was anything said by anyone with reference to retroactive pay?

A. Yes sir.

Q. Will you state by whom, when and where, and who was present?

A. After I had submitted my resignation and was preparing to leave, my superior, Mr. Gaw, called me in and he told me at that time that he did not know what effect the inequity program would take as to my case, but I think at that time he was trying to give me some reasons to stay on in the employ of the company.

Also (R. 138-9):

Q. (by Mr. Bushnell) From your testimony, you learned a letter came out December 15th, that is after you left?

A. Yes.

Q. Did you speak to anyone, was anything else done with regard to retroactive pay?

A. Yes sir.

Q. What was that?

A. When I checked with the payroll department clerk, that checked me out, took my address and told me it was for the purpose if retroactive pay was ever made they would know where to get in touch with me and where to pay.

Q. Did you contact the company at any other time with reference to retroactive pay?

A. Yes. I did.

Q. When was that?

A. In May 1951, I believe.

Q. Where did you go to see about it at that time?

A. I stopped in Mr. Jones office, I went there for the express purpose of submitting my application for retroactive pay.

Q. Were you permitted to talk to Mr. Dillon?

A. No.

Q. Who did you talk to?

A. A girl in charge of his office.

Q. Tell what happened?

A. She took the information down, went in Mr. Dillon's office, I suppose she discussed the problem with Mr. Dillon, and came back.

MR. PARSONS: What he supposed is not relevant.

THE COURT: Yes.

MR. BUSHNELL: Strike it.

Q. (by Mr. Bushnell) What did she say when you came back?

A. She said I was not elegible and did not need to submit the application.

Q. This is two or three months after you quit?

A. Yes sir.

MR. BUSHNELL: You may cross examine.

And on cross examination (R. 139):

Q. No one in authority ever told you you were going to get your retroactive pay, and your name was not on the payroll at the time the plan became effective, did they?

A. No sir, no one told me I wouldn't either.

Q. You were paid the full amount that you were entitled to so far as any wages were concerned, were you not?

A. Well at the rate I was receiving at that time, in anticipation of inequity, I would say I was paid at the rate that was paid for the job at our particular plant for the particular job at that particular time.

Of course, we always anticipated the fact we might get inequity, and it would cover the same period covered for hourly workers, with which I was familiar.

Q. You hoped you would?

A. I thought I would, yes, because it was the custom of the company to always treat their salaried employees as good, if not better.

Q. Aside from that, when you left, you had been paid in full, hadn't you?

A. Yes sir.

Finally, on page 141 of the record:

Q. (by Mr. Parsons) You have used the word "custom" or "practice" what do you mean by those words?

A. Well, where ever benefits were given to one group of employees, such as those covered by the bargaining units of which there are two groups, the company has always, as far as I know, came — gave similar benefits to the

salaried employees, at least of the non-exempt salaried employees of which I was one.

Q. Really that is the sum and substance of your position, isn't it?

A. Well, I believe it is.
MR. PARSONS: That is all.

(1) In the first place, this evidence, selected as that most favorable to plaintiff, would appear to fall far short of that required to establish mutual assent to the promises of a contract. As set forth in Section 5 of the Restatement of Contracts, "a promise in a contract must be stated in such words either oral or written, or must be inferred wholly or partly from such conduct, as justifies the promisee in understanding that the promisor intended to make a promise".

The familiar illustrations of promises so implied are given as follows:

> 1. A telephones to his grocer, "Send me a barrel of flour." The grocer sends it. A has thereby contracted to pay a reasonable price therefor.
>
> 2. A, on passing a market, where he has an account, sees a box of apples marked "5 cts. each." A picks up an apple, holds it up so that a clerk of the establishment sees the act. The clerk nods, and A passes on. A has contracted to pay five cents for the apple.

(2) Secondly, the requirement of certainty is not met. Section 32 of the Restatement sets forth this requirement in the following language:

## § 32. REQUIREMENT OF CERTAINTY IN THE TERMS OF AN OFFER.

*An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain.*

Comment:

a. Inasmuch as the law of contracts deals only with duties defined by the expressions of the parties, the rule stated in the Section is one of necessity as well as of law. The law cannot subject a person to a contractual duty or give another a contractual right unless the character thereof is fixed by the agreement of the parties. A statement by A that he will pay B what A chooses is no promise. A promise by A to give B employment is not wholly illusory, but if neither the character of the employment nor the compensation therefor is stated, the promise is so indefinite that the law cannot enforce it, even if consideration is given for it.

b. Promises may be indefinite in time or in place, or in the work or things to be given in exchange for the promise. In dealing with such cases the law endeavors to give a sufficiently clear meaning to offers and promises where the parties intended to enter into a bargain, but in some cases this is impossible.

c. Offers which are originally too indefinite may later acquire precision and become valid offers, by the subsequent words or acts of the offeror or his assent to words or acts of the offeree.

With respect to comment "c", such occurrences in this case did not take place until after plaintiff had resigned, supra.

An apt illustration is cited from page 42, under this section:

> 6. A promises B to sell to him and B promises A to buy of him goods "at cost plus a nice profit." The promise is too indefinite to form a contract.

Construing the evidence in this case most favorably for plaintiff, Geneva at best promised to pay Rasmussen X dollars per month. True, there was a hope for more; more had been granted other groups. But as to the general office employees, including plaintiff, no one in authority had ever announced during plaintiff's period of employment whether or not such a retroactive pay plan would ever be adopted, or if so, on what conditions, supra. This announcement did not come until December 15, 1950 and later; and by then plaintiff was no longer an employee so could not assent to such a promise or extend any consideration therefor.

Not only was the $64 question unannounced — if there would be a plan at all; but such details as the retroactive date, the amounts, the cut-off dates, the effective dates, and who should be qualified under the plan — all were as wide open as the sky. Not until December 15, 1950 — fifteen days after the effective date of plaintiff's voluntary resignation — did the President of the Company announce through Exhibits D-15 and D-16 that there would be any plan at all for the general office employees. This first official announcement was made in these words:

SUBJECT: Salary Adjustment for Nonexempt

Salaried Employees (Except those Employed within the Geneva and Ironton Plants)

Effective December 1, 1950, the nonexempt salaried employees within your department receive an increase of $22 per month.

A program for the description, job classification, and establishment of a standard salary scale for nonexempt salaried jobs (except those within the Geneva and Ironton Plants, where a like program has been completed) is presently under way and will be completed as soon as possible. Upon completion of the program, any adjustment in salary resulting therefrom will be adjusted from March 9, 1947 forward for all nonexempt salaried employees who are on the payroll the date the standard salary scale is made effective.

Will you please advise nonexempt salaried personnel within your department, whose salary rates will be adjusted as shown above.

Not until the following June were the details perfected and the plan announced as effective June 3, 1951 (Ex. P-12); but by then plaintiff was long since gone by his own choice.

(3) Finally, this situation is not unlike the "bonus" situations concerning which some comparable cases have been decided by courts of sister jurisdictions. These are annotated in 28 A.L.R. 346; and such cases as Haag v. Rogers, (1911) (Ga.) 72 S.E. 46, makes it clear that voluntary termination of employment before the time specified in the employer's offer results in forfeiture of the bonus or retroactive pay because of failure of performance on the part of the employee.

Reference is also made to the case of Pyeatt v. El Paso Natural Gas Co. (N. Mex. 1950), 213 P. 2d 436. There the court denied recovery to employees who had quit before the effective date of a retroactive wage increase. The employer had announced his intention of seeking War Labor Board approval of such a plan; but the Board then disapproved the proposals, following which the employees voluntarily terminated their services. Subsequently the Board modified its position and a plan was made effective, but not as to plaintiffs. The court there referred to the bonus case rule, affirming the employer's position, stating that if the employee "voluntarily terminates his services before the bonus is payable he is not entitled to it."

A *fortiori* here, where plaintiff quit work voluntarily before any offer at all had as yet been made by Geneva.

The court below accordingly erred when it denied defendant's motion for a directed verdict (R. 147); and failed to grant judgment for defendant notwithstanding the verdict. (R. 221)

## II.

**The court erred in admitting evidence of acts by the Company subsequent to November, 1950, by which time plaintiff's employment had ceased.**

## III.

**The court erred by its instruction No. 10 in permitting the jury to consider evidence of acts of the employer subsequent to November, 1950, by which time plaintiff's employment had ceased.**

These two points are argued together, since the net result was to place before the jury for consideration evidence not applicable to plaintiff's contract of employment — whatever it was — since he had quit.

As pointed out above, plaintiff voluntarily terminated his employment effective at the end of November, 1950, at which time no offer of retroactive pay had been made; it was then not known if there would be a plan for the general office employees at all, or the terms thereof if such a plan were to be effected.

The court below had correctly ruled on several occasions (e.g., R. 5) and in his other instructions that the employment contract was to be determined from facts and circumstances during the period of plaintiff's service, i.e., from January 20, 1947 to December 1, 1950. (R. 199, 200) Then, on the theory that such evidence might indicate "if the defendant company intended to follow the usual practice and procedure, if any, with reference to salaries paid to different groups of employees of the defendant company" (R. 201), the court proceeded to admit evidence of acts and statements of the Company done or made after December 1, 1950; and by its instruction No. 10 permitted the jury to consider such evidence for the purpose quoted above.

This evidence consisted of such items as the news release of the retroactive pay plan as finally announced affecting the general office employees (Ex. P-7); a letter of April 2, 1951 to the Government requesting authority to adopt such a plan (Ex. P-8); the job description (Ex. P-9) and job classification (Ex. P-10) adopted for

the position which plaintiff had formerly held; a tentative study as to Rasmussen upon which the amount due, if any, was stipulated (Ex. P-11); the plan as finally promulgated by the employer June 1, 1951 (Ex. P-12); and a somewhat comparable plan of another subsidiary, the United States Steel Corporation of Delaware (Ex. P-13).

A great variety of oral testimony was required to identify and explain these various exhibits, including that of Dillon (R. 84-88); Friedley (R. 88-93-5); and Heald (R. 57). Much of this testimony involved argument and explanation as to the exact background, construction and meaning of Exhibit 12 — the announcement of the plan effective June 3, 1951, including its effect on pregnant women (R. 157), although plaintiff had long before departed at the end of November, 1950 (R. 41).

All of this redundant and irrelevant material could not help but prejudice the jury, which under the confusion compounded reacted about as might have been expected. For this reason alone the judgment should be reversed.

## CONCLUSION

This appeal really involves nothing more than an elementary review of some fundamentals of the law of contracts, agency and evidence, and the application of these hornbook rules to the facts of this case:

1. A contract is a promise or set of promises (Restatement of Contracts, §1) which must be stated in such words either oral or written, or must be inferred

wholly or partly from such conduct, as justifies the promisee in understanding that the promisor intended to make a promise (Restatement, §5), and must be so definite in its terms that the promises and performances to be rendered by each party are reasonably certain (Restatement, §32).

2. Evidence must be relevant and material (Model Code of Evidence, Rules 1 and 9). In the absence of such evidence to support the necessary elements of plaintiff's case, of course there can be no recovery.

3. To bind the corporate employer, the promise must be made by agents acting within the scope of their authority (Restatement of Agency, §12).

4. Plaintiff's case requires competent proof that defendant's predecessor promised him as a consideration for his services that in addition to the exp[redacted] rate of pay, he would be given retroactive pay under a job evaluation program, whether or not plaintiff was still employed at the time such plan was to be made effective.

Search as we must throughout the record — including the 50-page Exhibit 14, and selecting and construing as again we must, all that is most favorable to plaintiff, we respectfully submit that nothing of substance can be discovered other than, in the words of plaintiff himself (R. 139), an anticipation or hope that such a result as he now claims *might* eventually be effected by the employer. But necessarily — since such a promise was never made, but in fact was denied during the employ-

ment period (R. 139), such hope or anticipation would come, if ever, as a matter of *grace*; and not pursuant to a contractual right enforceable at law.

To illustrate the remaining two points on this appeal, we ask the court to review briefly Exhibit P-14, the "United States Steel News" of July, 1950. On page 33 will be found an article about the performance of a contract between the C.I.O. and various companies other than Geneva Steel. Admittedly if plaintiff had read this article, he might well have entertained some hope, as have members of the Utah Judiciary over the years, for ultimate salary increases.

As applied to this case, we respectfully submit that the only relevant portion of Exhibit 14 would be the article on page 41 on Mrs. Geneva Steele with its heading "Confusion, Confusion and More Confusion."

There was not only the absence of competent proof in this case to support a promise by the employer; but such a wealth of immaterial, irrelevant and incompetent exhibits and testimony that it could not escape confusing the jury to the prejudice of defendant.

Respectfully submitted,

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